No. 89-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Petitioners,

v.

JOHN F. ROSCH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONERS

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In reply to the Brief in Opposition to the Petition for Writ of Certiorari, Petitioners, Jack L. Hargrove Builders, Inc. and Jack L. Hargrove ("Hargrove") state as follows:

INTRODUCTION

From the inception of this lawsuit, Hargrove has attempted to demonstrate, to no avail, that relevant and probative evidence in this case was systematically excluded by the Illinois courts, regarding the inherent

nature of Rosch's transaction with Hargrove; the utter immateriality of the list Rosch reviewed prior to his transaction with Hargrove; and the total absence of damage to Rosch as a result of the transaction. Hargrove attempted to demonstrate, to no avail, that evidence relating to events both before and after the parties' transaction on March 1, 1981 was essential to its case. Unfortunately and inexplicably, Illinois' courts refused to give Hargrove the opportunity to introduce evidence of events dated after March 1, even though this opportunity was granted to Rosch to support his case on damages.

Contrary to Rosch's claims, Brief in Opposition at 5, Hargrove's position at this stage is not "totally inconsistent with the position adopted by [its] counsel" at trial. At trial, Hargrove sought consistency and fairness in the trial court's rulings—nothing more. On appeal, Hargrove sought to have the Illinois Appellate Court and Illinois Supreme Court avoid excessive deference to the talisman of "manifest weight of the evidence," but instead apply a reasoned review of the facts and merits of Hargrove's case. Nothing more. To date, Hargrove's efforts have been fruitless.

Hargrove has not "attacked" anyone disagreeing with its theory of the case, despite what Rosch may think. Hargrove's counsel has fought to win justice for an innocent defendant and deny a windfall profit to a wholly undeserving plaintiff. Nothing more.

REPLY OF THE PETITIONERS

I.

EVIDENCE OF ROSCH'S INDICTMENT IS DIRECTLY RELEVANT TO THIS CASE.

It is hardly "character assassination," as Rosch suggests, to inform this Court of the existence of Rosch's recent indictment, on issues central to this case. Brief in Opposition at 7. Rosch claims that Counts 1 through 28 of his indictment have "nothing whatsoever to do" with any matter before this Court, because they concern Glen Ellyn loans made after Rosch's March 1, 1981 transaction with Hargrove, *id.* at 6. In fact, Hargrove's petition addresses itself to only one of the counts of the indictment, Count 29, which unquestionably concerns Rosch's transaction with Hargrove and has everything to do with the matter before this Court. The allegations in Count 29 concern Rosch's concealment of his interest in the Oak Hills portion of Woodridge; Rosch won nearly half of his fraud judgment by contending that Hargrove failed to disclose debts for Oak Hills. Hargrove adds, however, that the full 29 count indictment of Rosch and others is highly material to the issue of Rosch's motivations for his deal with Hargrove—to the question of whether Rosch would have transacted with Hargrove, but for Hargrove's alleged misrepresentations.

1. The Supervisory Report Provided by Rosch Provides Further Evidence of Rosch's Perjured Trial Testimony.

The question of Rosch's truthfulness at trial—especially, Rosch's statements that he advised the Glen Ellyn Board of Directors of his interest in Woodridge and abstained from voting on the board's decision to fund Woodridge at the time Rosch was a 50 percent owner, C-8158; 9428-

29—is essential to this case. If Rosch gave false testimony, and if in fact he defrauded his own savings and loan by concealing his interest in Woodridge, as the federal criminal indictment against him alleges, then Rosch's credibility is without weight and the judgment against Hargrove is a miscarriage of justice. Ironically, the Supervisory Report appended to Rosch's Brief in Opposition sheds further light on this question and reinforces *Hargrove's*, not Rosch's, theory of the case.

The Supervisory Report of Examinations regarding Rosch's disclosures to his Board of Directors at Glen Ellyn Savings and Loan, prepared by the Illinois Commissioner of Savings and Loan Associations and the Federal Home Loan Bank Board—identified herein as "Rosch App."—is as telling for what it does *not* say about Rosch's disclosures to the Glen Ellyn Board as it is for what it does say. The report, dated April, 1983, states that Rosch previously revealed to the Glen Ellyn Board his business relationship with Heinz, Glen Ellyn's "largest multiple borrower." The report does *not* state whether this disclosure occurred before the Rosch-Hargrove transaction. Rosch App. at A4. The report states that Rosch previously disclosed that he had various personal business transactions with Mr. Heinz, sometimes concerning projects financed by Glen Ellyn. *Id.* The report does not state whether the Glen Ellyn Board knew in March, 1981 of Rosch's role as the co-developer of Woodridge, with Heinz.

Finally, according to the report, in December, 1982 Rosch "agreed to sever any and all relationships with Mr. Heinz" to avoid the potential for conflict, and further agreed that "any *subsequent* dealings with Mr. Heinz will be done only by the board of directors with Mr. Rosch abstaining from any vote." Rosch App. at A4 (emphasis added). If Rosch agreed to abstain from voting on future projects involving Heinz only in December, 1982, it is

probable that Rosch did *not* abstain from voting on the Board's loans to Woodridge, which Hargrove applied for in the fall of 1980 but which were only funded after Rosch acquired Hargrove's interest. Such evidence, if true, directly contradicts Rosch's testimony at trial. C-8158; 9428-29.

The Supervisory Report, like Rosch's indictment itself, offers support for Hargrove's theory of defense in this matter, and also lends support to Hargrove's claim that unconstitutional rulings made against Hargrove deprived Hargrove of any meaningful chance to make its case.

II.

THIS COURT CLEARLY HAS JURISDICTION OVER THE INSTANT PETITION.

Rosch's contention that this Court lacks jurisdiction over this Petition is wrong: during the course of trial and in subsequent appeals, Hargrove repeatedly raised timely objections to each of the evidentiary rulings at issue. The fact that Hargrove did not initially identify the trial court's errors as constitutional violations is of no moment.

1. Hargrove Raised The Erroneous Evidentiary Rulings At Trial.

For a reviewing court to determine whether a trial court committed reversible error, it is only necessary for specific acts or omissions constituting error to be properly suggested as error to the trial court and presented for review. *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 (3d Cir. 1982). A party must adequately inform the trial and appellate courts that error has occurred, so that the court can consider its rulings and correct them. *Stone v. Morris*, 546 F.2d 730 (7th Cir. 1976). There is no requirement that a constitutional theory be adopted and asserted from day one, however. "Arguments made

on appeal need not be identical to those made below . . . if the elements of the claim were set forth and additional findings of fact are not required." *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 525 (2d Cir. 1982). Hargrove presented the elements of its claim throughout trial and on appeal to no avail, both as to the exclusion of evidence on Hargrove's theory of defense and as to the court's erroneous evidentiary rulings on damages. C-8392-93; 9326; 9359-76; 9428-40.

2. Hargrove Raised Specific Constitutional Objections With The Illinois Supreme Court.

Even if it is assumed, *arguendo*, that Hargrove did not adequately present constitutional objections to evidentiary rulings at trial, there is no doubt that Hargrove properly raised its objections, as constitutional objections, at the time it filed its petition for rehearing.

On appeal, a party may not preserve a constitutional challenge merely by making generic references to the Constitution. *Taylor v. Illinois*, 484 U.S. 400, ____ n. 9, 108 S.Ct. 646, 651 n. 9 (1987). An objection *is* properly preserved, however, if a state court has been properly apprised of the nature of the constitutional objection. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

As even Rosch concedes, Hargrove made specific and direct objections on Fourteenth Amendment, due process, grounds in its petition for rehearing before the Illinois Supreme Court. In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988)—a case relied on by Rosch himself—this Court recognized that such specific constitutional challenges *will* properly preserve the constitutional issues for appeal. *Crenshaw*, 108 S.Ct. at 1650.

At trial and on appeal, Hargrove properly raised objections relating to the trial court's erroneous and un-

constitutional evidentiary rulings, giving this Court jurisdiction over this Petition.[1]

3. The Interests Of Justice Require That This Court Exercise Jurisdiction Over The Instant Petition.

Even assuming, *arguendo*, that Hargrove's assertion of a due process violation by the Illinois Courts was otherwise waived, in light of the recent indictment of Rosch on matters central to Hargrove's appeal, it is essential that this Court grant certiorari to prevent a miscarriage of justice.

It is well-established that a litigant's failure to make timely objections to error will not constitute a waiver of those objections, if the error is so fundamental as to result in a miscarriage of justice. *Lee v. Dallas County Board of Education*, 578 F.2d 1177 (5th Cir. 1978). In *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), this Court recognized that "no general rule" limits a reviewing court's power to determine new issues "where injustice might otherwise result." Particularly where due process considerations are implicated, as here, a litigant is entitled to have his appeal considered regardless of the preservation

[1] Hargrove notes, additionally, that the constitutional violations involved here occurred only with the trial court's judgment and thereafter. Hargrove could not have anticipated and could not raise objections to these rulings in the course of trial. Hargrove did assert the violation of its constitutional rights as soon as its claim fully ripened, i.e., as soon as the Illinois Supreme Court affirmed the lower court's unconstitutional rulings and then found, contrary to precedent, that "[h]ow Rosch . . . subsequently dealt with [Woodridge] liabilities was irrelevant" to the determination of damages. Opinion at 11. When a federal issue arises from an unanticipated ruling of the state court, and a petition for rehearing presents the first opportunity to raise a constitutional objection, the issue is not waived. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Estate of Wilson v. Aiken Industries*, 439 U.S. 877, 879 (Blackmun, J., concurring).

of the issue below. *Gomes v. Williams*, 420 F.2d 1364 (10th Cir. 1970); *Taylor v. National Trailer Company, Inc.*, 433 F.2d 569 (10th Cir. 1970). The interest in reviewing new issues where justice requires has been reaffirmed by this Court in *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

In *United States v. Krynicki*, 689 F.2d 289 (1st Cir. 1982), the First Circuit listed four factors to be weighed in deciding whether to hear a new issue on appeal: (1) whether the new issue is purely legal; (2) whether the argument of the party raising the issue is highly persuasive; (3) whether the issue would likely arise in other cases, if not heard now; and, most importantly, (4) whether refusing to decide the argument would result in a miscarriage of justice. *Krynicki*, 689 F.2d at 292.

Hargrove's claims satisfy each of these criteria. First, the violation of Hargrove's constitutional rights can be determined without additional facts beyond the trial record. Deciding whether Hargrove received due process requires only that the Court apply the standards for due process to the events that occurred at trial. Second, Hargrove's argument is persuasive. A plaintiff must prove injury to be entitled to damages, and Rosch proved no injury at all here. *Kinsey v. Scott*, 124 Ill.App.3d 329, 463 N.E.2d 1359 (2d Dist. 1984); *Ustrak v. Fairman*, 781 F.2d 573 (7th Cir. 1986), *cert. denied*, 479 U.S. 824 (1986). In addition, Rosch's indictment provides clarity and support for Hargrove's theory of defense that Rosch arranged his transaction with Hargrove to defraud his own savings and loan, and that Rosch himself was not defrauded. Third, this issue is likely to recur: a holding by the Illinois courts that Rosch is entitled to damages, without any showing of loss, will invite a limitless number of uninjured plaintiffs to seek a windfall in the courts.

Finally, in light of the recent indictment of Rosch, on matters central to this Petition, this Court's consideration of this issue is necessary to prevent a miscarriage of justice to occur. Damages are a means by which an injured party can be made whole, and individuals who have lost nothing are entitled to be given nothing. There is now compelling evidence that Rosch was neither injured nor defrauded in his transaction with Hargrove. Particularly in light of Rosch's indictment, it is clear that the Illinois courts' rulings in this matter threaten to transfer money from an innocent defendant to an undeserving plaintiff. A granting of a writ of certiorari is necessary to prevent this miscarriage of justice.

CONCLUSION

For the foregoing reasons, Petitioners Jack L. Hargrove and Jack L. Hargrove Builders, Inc. pray that a Writ of Certiorari issue to review the decision of the Illinois Supreme Court and, upon review, to reverse that Court's decision in this case.

Respectfully submitted,

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